No. 89-700 (16)

In the Supreme Court of the United States

OCTOBER TERM, 1989

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, PETITIONER

v.

SHURBERG BROADCASTING OF HARTFORD, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT SHURBERG BROADCASTING OF HARTFORD, INC.

JOHN G. ROBERTS, JR.
Acting Solicitor General
JAMES P. TURNER
Acting Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
ROGER CLEGG
Deputy Assistant Attorney General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

37 pp

QUESTION PRESENTED

Whether the Federal Communications Commission's minority distress sale policy, which permits certain licenses to be transferred only to minority-controlled firms, violates the equal protection component of the Fifth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Cases – Continued: Page

Constitution, statutes, and regulations:

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-700

ASTROLINE COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, PETITIONER

v.

SHURBERG BROADCASTING OF HARTFORD, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT SHURBERG BROADCASTING OF HARTFORD, INC.

INTEREST OF THE UNITED STATES

The United States is responsible for enforcing many statutes prohibiting discrimination on the basis of race or national origin (see, *e.g.*, 42 U.S.C. 2000e-5(f)(1)), and may intervene in cases brought under the Fourteenth Amendment (see, *e.g.*, 42 U.S.C. 2000h-2). The United States filed extensive comments with the Federal Communications Commission as part of the inquiry proceeding to consider the validity of its minority preference policies,[1] and has recently filed a brief as amicus curiae in *Metro*

[1] See *Reexamination of the Commission's Comparative Licensing, Distress Sales and Tax Certificate Policies Premised on Racial, Ethnic, or Gender Classifications*, 1 F.C.C. Rcd 1315 (1986), modified, 2 F.C.C. Rcd 2377 (1987); J.A. 48-66.

Broadcasting, Inc. v. *FCC*, No. 89-453, a case that involves the validity of one of those policies.[2] In each of these submissions, the United States has maintained that the Commission's policies could not withstand the exacting scrutiny required by the Constitution and this Court's decisions, and were thus invalid. The United States adheres to that position.[3]

STATEMENT

1. When a television or radio broadcast license has been designated for a revocation hearing, or when a license renewal application has been scheduled for a qualification hearing, the Federal Communications Commission (FCC) generally prohibits the licensee from assigning or transferring the license until the Commission determines whether the licensee remains qualified to hold it. See, *e.g.*, *Northland Television, Inc.*, 42 Rad. Reg. 2d (P & F) 1107, 1110 (1978). The Commission's "distress sale" policy represents an exception to that general rule, "developed initially as a way of avoiding time consuming hearings when expeditious action to oust the licensee was desirable—for example, when the licensee was bankrupt or disabled." Pet. App. 4a-5a; see *Cathryn Murphy*, 42 F.C.C.2d 346 (1973); *La Rose* v. *FCC*, 494 F.2d 1145 (D.C. Cir. 1974).

As originally conceived and implemented, the FCC's distress sale policy was race-neutral. However, as a result of decisions of the District of Columbia Circuit, see, *e.g.*, *TV 9, Inc.* v. *FCC*, 495 F.2d 929 (1973), cert. denied, 419 U.S. 986 (1974); *Garrett* v. *FCC*, 513 F.2d 1056 (1975), the FCC supplemented the original policy by adopting a minority distress sale policy. See *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 F.C.C.2d 979, 983 (1978) [*1978 Policy Statement*];

[2] We have provided copies of our brief in *Metro Broadcasting* to each party's counsel in this case.

[3] Given the position of the United States on the question presented, and in order for the Court to have the benefit of the views of the administrative agency involved, the Acting Solicitor General has authorized the Federal Communications Commission to appear before this Court through its own attorneys. See 28 U.S.C. 518(a); 28 C.F.R. 0.20(a).

Minority Ownership Taskforce, FCC, *Minority Ownership in Broadcasting* 1-3, 8-12, 30-31 (1978) [*Task Force Report*]. That policy permits licensees whose licenses have been designated for a revocation hearing, or whose renewal applications have been designated for a hearing on qualification issues, to transfer or assign the license at a "distress sale" price, but only to applicants who have a significant minority ownership interest and meet other qualifications. *Id.* at 983. The Commission explained that the policy was being adopted because "[f]ull minority participation in the ownership and management of broadcast facilities results in more diverse selection of programming * * * [, and] an increase in ownership by minorities will inevitably enhance the diversity of control of a limited resource, the [broadcast] spectrum." *1978 Policy Statement*, 68 F.C.C.2d at 981.[4]

For purposes of the distress sale policy, the Commission defined "minorities" to include "those of Black, Hispanic Surnamed, American Eskimo, Aleut, American Indian and Asiatic American extraction." *1978 Policy Statement*, 68 F.C.C.2d at 980 n.8. To be eligible to make a distress sale purchase, an applicant must meet the Commission's basic qualifications and have a minority ownership interest that exceeds 50% or is controlling, except that an applicant organized as a limited partnership will be deemed to be one with "significant minority involvement" if there is a general partner who is a minority with a 20% interest in the partnership and who will exercise "complete control over a station's affairs." See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 F.C.C.2d 849, 853, 855 (1982). To receive Commission approval, the distress sale price must be no higher than 75% of the combined fair market value of the station and license. See *Grayson Enterprises, Inc.*, 47 Rad. Reg. 2d (P & F) 287, 293 (1980).[5]

[4] This programming diversity rationale has also been invoked to support several other FCC policies designed to promote greater minority participation in broadcasting, including the policy of awarding preferences for minority ownership in comparative license proceedings at issue in *Metro Broadcasting* v. *FCC*, No. 89-453. See U.S. Amicus Br. 3 n.3, *Metro Broadcasting, Inc.* v. *FCC*, No. 89-453.

[5] From fiscal years 1979 through 1988, the FCC has approved only 38 distress sales. During that same period, the Commission approved a total of approximately 10,000 sales of broadcast stations. See FCC Br. 43-44 & nn.43, 44.

2. The FCC's proceedings at issue here involve the broadcast license for Channel 18 (WHCT-TV), Hartford, Connecticut, held by Faith Center, Inc. After the Commission had designated Faith Center's license renewal application for a hearing, Faith Center twice sought and received the Commission's approval to make a distress sale. See *Faith Center, Inc.*, 88 F.C.C.2d 788 (1981); *Faith Center, Inc.*, 54 Rad. Reg. 2d (P & F) 1286 (1983). In each instance, however, Faith Center was unable to close the transaction. As a result, its renewal application reverted to designated-for-hearing status. Pet. App. 6a-8a, 116a-117a.

In December 1983, respondent Alan Shurberg, the sole owner of Shurberg Broadcasting Company of Hartford, Inc. (collectively "Shurberg"), tendered an application to the FCC for a permit to build a television station in Hartford, an application that was mutually exclusive with Faith Center's pending renewal application for Channel 18. In April 1984, Shurberg asked the Commission to designate that application for a comparative hearing with Faith Center's pending application. In June, however, Faith Center once again sought the Commission's approval to make a distress sale, this time requesting permission to sell to petitioner Astroline Communications Company Limited Partnership, a minority-controlled applicant. Shurberg opposed the distress sale on a number of grounds, including his contention that the Commission's distress sale policy violated his constitutional right to equal protection. Pet. App. 8a-9a.

In December 1984, the FCC approved Faith Center's application for permission to assign its broadcast license to petitioner under the distress sale program. Pet. App. 113a-129a; see *Faith Center, Inc.*, 99 F.C.C.2d 1164 (1984).[6] The Commission rejected Shurberg's constitutional challenge to the minority distress sale program as "without merit," citing the *1978 Policy*

[6] The FCC rejected Shruberg's argument that he was entitled to a comparative hearing against Faith Center's renewal application, concluding that the

> minority ownership policies, as reflected here in the distress sale proposal, are sufficiently important to warrant maintaining Faith Center's renewal application in hearing status, protected from competing applications, for a sufficient additional time to permit us to consider the pending applications to assign the license to [petitioner].

Pet. App. 121a. The Commission also rejected Shurberg's application for a construction permit because he had not complied with controlling regulations. See 47 C.F.R. 73.3516(e). Lastly, the Commission rejected Shurberg's contention that petitioner was not a bona fide minority-controlled applicant. Pet. App. 125a-126a.

Statement, the *Task Force Report*, and decisions of the District of Columbia Circuit such as *West Michigan Broadcasting Co.* v. *FCC*, 735 F.2d 601, 609-611 (1984), cert. denied, 470 U.S. 1027 (1985), which have "repeatedly defined as an important public interest objective the participation of heavily underrepresented minorities in the ownership and operation of broadcast stations." Pet. App. 123a. Finally, the Commission concluded that Congress, in requiring that the Commission incorporate "significant preferences for minority applicants" into a random lottery selection scheme for the award of licenses to conduct or operate new stations, see 47 U.S.C. 309(i)(3)(A), has "reaffirmed the importance of fostering minority ownership of broadcast stations." *Ibid.*

Shurberg then filed a petition for review of the Commission's order in the District of Columbia Circuit.[7] Meanwhile, on January 23, 1985, Faith Center and petitioner closed the distress sale. Petitioner bought the Channel 18 license and station assets

[7] The disposition of Shurberg's appeal was delayed for several years while the Commission began a reconsideration of its minority preference policies. See U.S. Amicus Br. 4-5 n.4, *Metro Broadcasting, Inc.* v. *FCC*, No. 89-453. In 1987, Congress enacted an appropriations rider that prohibited the Commission from spending any appropriated funds "to repeal, to retroactively apply changes in, or to continue a re-examination of" its minority and female preference policies. Pub. L. No. 100-202, 101 Stat. 1329-31 to 1329-32 (1987). Congress has since extended the prohibition through fiscal years 1989 and 1990. See Pub. L. No. 100-459, 102 Stat. 2216-2217 (1988); Pub. L. No. 101-162, 103 Stat. 1020-1021 (1989). In response to the appropriations rider, the FCC closed its inquiry proceeding and reinstated its policy of preferring minority-controlled applicants in distress sales. See *Order (MM Docket No. 86-484)*, 3 F.C.C. Rcd 766 (1988). The FCC then reaffirmed its earlier decision in this case approving Faith Center's application for permission to assign its broadcast license to petitioner under the distress sale program. See *Faith Center, Inc.*, 3 F.C.C. Rcd 866 (1988).

for $3.1 million; the fair market value of the license and station assets had been appraised at $6,520,000. See Pet. App. 11a, 30a n.17.

3. In March 1989, a divided court of appeals reversed. Pet. App. 1a-112a.[8] In a brief per curiam opinion, the panel majority held that the Commission's minority distress sale policy "unconstitutionally deprives Alan Shurberg and Shurberg Broadcasting of their equal protection rights under the Fifth Amendment because the program is not narrowly tailored to remedy past discrimination or to promote programming diversity." *Id.* at 2a. The court accordingly remanded the case to the Commission for further proceedings. Judges Silberman and MacKinnon, who comprised the panel majority, each filed separate opinions concurring in the judgment. See *id.* at 3a-52a (Silberman, J.); *id.* at 53a-69a (MacKinnon, J.).[9]

In Judge Silberman's view, the Commission sought to justify its minority distress sale program "both as a means to foster diverse programming and as a remedy for past discrimination." Pet. App. 25a. Turning first to the latter justification, he stated that "[n]either Congress nor the FCC ever found any evidence

[8] While the case was pending before the court of appeals, petitioner entered into voluntary reorganization proceedings under Chapter 11 of the Bankruptcy Code. See Order, *In re Astroline Communications Co.*, No. 2-88-01125 (Bankr. D. Conn. Dec. 1, 1988). That bankruptcy proceeding remains pending. Petitioner has informed the FCC that its financial condition and future operation of the television station are uncertain. See *Arnold L. Chase*, 4 F.C.C. Rcd 5085 (1989); see also FCC Br. 16 n.16.

[9] As a threshold matter, Judge Silberman concluded that the Commission had properly applied the governing statute and regulations (47 U.S.C. 307(c); 47 C.F.R. 73.3516(e)) in concluding that Shurberg was not entitled to a comparative hearing. See Pet. App. 13a-17a. Neither Judge MacKinnon nor Chief Judge Wald disagreed with this conclusion.

In addition, Judge Silberman concluded that the Commission had not exceeded its statutory authority under the Communications Act of 1934 when it adopted the minority distress sale policy. See Pet. App. 17a. Judge MacKinnon apparently agreed with this conclusion. See *id.* at 56a ("the case has leveled down to a constitutional attack on the distress sale policy"). Chief Judge Wald addressed the constitutional issue in light of the majority's decision to do so. See *id.* at 72a-73a n.3.

to link minority 'underrepresentation' to discrimination by the FCC or to particular discriminatory practices in the broadcasting industry," *id.* at 27a, and that, in any event, the Commission's program "does not conform to the stricture of the Constitution because it is not narrowly tailored to remedy past discrimination," *id.* at 29a. With respect to the programming diversity rationale, Judge Silberman rejected the proposition that such an interest, in the context of this case, is sufficiently compelling to support the race-based preference. See *id.* at 36a-41a. He noted, among other things, that the Commission, in recently abandoning the "fairness doctrine," had determined "that there is no longer an inadequate diversity of viewpoints in television programming." *Id.* at 40a. Judge Silberman concluded that, in any event, the Commission's distress sale policy was not narrowly tailored to achieve that goal. "As a means to promote diverse programming, the distress sale policy rests on the questionable premise that minority ownership will by itself lead to minority programming (or programming that might be thought to have a minority perspective)." *Id.* at 41a-42a.

Judge MacKinnon concurred in the judgment, concluding that the Commission's minority distress sale program "does not satisfy the 'narrowly tailored' requirement of equal protection analysis." Pet. App. 54a.[10] In his view, "the program is open-ended in that circumstances may cause it to be applied to any broadcast licensee without regard to any past discrimination." *Id.* at 61a. Accordingly, Judge MacKinnon concluded that the program "unduly burdens innocent nonminorities." *Id.* at 66a.

Chief Judge Wald dissented, concluding that the "majority's invalidation of the Commission's ten-year old minority distress sale program * * * impermissibly overturns a considered congressional judgment as to the appropriate means of assuring diversity of viewpoint over the national airwaves." Pet. App.

[10] For that reason, Judge MacKinnon chose not to reach the question "whether either promoting programming diversity or remedying societal discrimination [is] a sufficiently compelling governmental interest to support the use of government sponsored minority preference programs." Pet. App. 60a n.11.

70a. Chief Judge Wald accepted as both reasonable and supported by congressional fact finding the connection between minority ownership and diversity of programming. See *id.* at 92a-100a. She also disputed the conclusion that the Commission's program impermissibly burdens innocent nonminorities, finding that "the very limited circumstances in which the distress sale policy can be invoked, suggest that the burden the policy places on nonminority applicants is acceptable." *Id.* at 109a.[11]

SUMMARY OF ARGUMENT

I. The FCC's policy classifies on the basis of race and is therefore constitutionally suspect. In *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), five Members of the Court concluded that a state or local government's use of a racial classification is subject to "strict scrutiny," that is, the racial classification must be "narrowly tailored" to achieve a "compelling governmental interest." In our view, a racial classification adopted by the federal government, no less than a state or local government, should be subject to the same exacting standard of review. In deciding whether a federal preference program is designed to achieve a compelling governmental interest, a determination made by Congress that there is a need for remedial race-conscious action should be entitled to significant deference. This additional measure of deference is appropriate, however, only if Congress itself makes the critical determination that such a program is required, and only if this determination has a demonstrable basis in fact. And any such racial classification must be narrowly tailored to achieve the compelling governmental interest identified by Congress.

II. A. This Court has endorsed only one sufficiently compelling justification for a racial classification: remedying the ef-

[11] The court of appeals later denied petitions for rehearing, together with suggestions of rehearing en banc, filed by both petitioner and the FCC. Pet. App. 143a-154a; *id.* at 155a-160a. Chief Judge Wald, joined by Judges Robinson, Mikva, Edwards, and Ruth B. Ginsburg, dissented from the denial of rehearing en banc. *Id.* at 155a-160a.

fects of identified present or past racial discrimination. That justification, however, may not be invoked to uphold the preference policy at issue. First, Congress has not specifically mandated that the Commission adopt or maintain the minority distress sale policy in order to remedy prior discrimination. Second, even if Congress could somehow be viewed as having advanced a remedial justification, it cannot be said that Congress had sufficient evidence before it of prior discrimination in the broadcasting industry—let alone in the awarding of broadcast licenses—to justify race-conscious relief. Third, the FCC, the agency that authored the "policy" Congress has frozen, has consistently taken the position that its policy is *not* designed to remedy prior discrimination in the broadcasting industry. And finally, the amorphous notion of prior "societal discrimination" may not serve as an adequate substitute justification.

Even if it could be said that the FCC's preference policy was adopted to remedy prior identified discrimination, it is plainly not "narrowly tailored" to achieve that alleged purpose. Neither Congress nor the Commission has adequately considered, much less tried, less intrusive race-neutral means to increase minority ownership of broadcasting licenses. Moreover, the minority distress sale policy is not aimed at correcting the actual effects of past discrimination, but instead reflexively confers an exclusive governmental benefit on all who possess the requisite skin color or ethnic background.

B. The second asserted justification for the minority distress sale policy is to further diversity of programming. But this Court has never held that such a quest for programming diversity is a sufficiently compelling justification for the government's use of a racial classification, and there is reason to question whether that justification—as applied to the public broadcasting spectrum—would so qualify. The idea that the government has a compelling interest in promoting viewpoints identified with specific racial or ethnic groups is deeply troubling, and appears to boil down to the type of racial stereotyping that is anathema to basic constitutional principles.

Moreover, even if programming diversity could count as a compelling governmental interest, neither Congress nor the FCC has established the factual predicates necessary to support the use of racial classifications to promote programming diversity. The legislative history shows at most that Congress relied on untested assumptions—about the existence of distinct "minority" viewpoints, about whether those viewpoints are underserved by today's broadcasting industry, and about whether increasing minority ownership would translate into more "minority" programming. Nor does the administrative history of the FCC's policy offer anything to shore up this inadequate factual record.

Putting aside the evidentiary difficulties with the "programming diversity" rationale, the FCC's policy is not "narrowly tailored" to accomplish that asserted goal. The policy's goal—diverse programming—is too indeterminate to allow either the Commission or any reviewing court to know whether it has ever been attained.

C. Finally, other novel justifications now advanced by the Commission and certain amici in support of the distress sale policy fare no better under the pertinent constitutional analysis. Apart from the fact that none of these new justifications ~~have~~ has been expressly invoked by Congress or previously relied upon by the FCC, each suffers from many of the same analytical deficiencies as the remedial and programming diversity theories. And the continued search at this late stage for an alternative rationale only reinforces the conclusion that the Commission's minority preference policies—inherently suspect because they classify on the basis of race and ethnic background—are policies in search of an adequate supporting justification.

ARGUMENT

THE FEDERAL COMMUNICATIONS COMMISSION'S MINORITY DISTRESS SALE POLICY, WHICH PERMITS CERTAIN LICENSES TO BE TRANSFERRED ONLY TO MINORITY-CONTROLLED FIRMS, VIOLATES THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

1. Classifications By The Federal Government On The Basis Of Race May Be Sustained Only If "Narrowly Tailored" To Achieve A "Compelling" Interest

A. The federal policy at issue in this case provides a valuable government benefit to applicants for broadcast licenses, but only if they are Black, Hispanic, Oriental, Indian, Eskimo, or Aleutian. It plainly classifies on the basis of race and thus conflicts with the fundamental principle embodied in the guarantee of equal protection that skin color and ethnic origin are generally inappropriate bases upon which to rest official distinctions between people. *Brown* v. *Board of Educ.*, 347 U.S. 483, 493-495 (1954); *Bolling* v. *Sharpe*, 347 U.S. 497, 499-500 (1954); *Strauder* v. *West Virginia*, 100 U.S. 303, 307-308 (1880).

In *City of Richmond* v. *J.A. Croson Co.*, 109 S. Ct. 706 (1989), five Members of the Court concluded that a state or local government's use of a racial or ethnic classification is subject to "strict scrutiny," that is, the classification must be "narrowly tailored" to achieve a "compelling governmental interest." *Id.* at 720-721 (1989) (opinion of O'Connor, J., joined by Rehnquist, C.J., and White and Kennedy, JJ.); *id.* at 735 (Scalia, J., concurring in the judgment). The first part of that constitutional analysis focuses on the asserted "compelling governmental interest" supporting the questioned classification, and involves two related inquiries: identifying the interest and determining whether it has a sufficient basis in fact. A majority of the Court has thus far endorsed only one justification for a racial classification that may in appropriate circumstances be sufficiently compelling: the government's interest "in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination," *Regents of the University of Cal.* v. *Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.). See

Croson, 109 S. Ct. at 721-723 (plurality opinion); *id.* at 743-745 (Marshall, J., dissenting); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 624-625 (1984); see also *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion).[12] The Court has also established that there must be a "strong basis in evidence for [the government's] conclusion that remedial action was necessary." *Croson*, 109 S. Ct. at 724 (opinion of the Court) (internal quotation marks and citation omitted); see also *id.* at 727; *Wygant*, 476 U.S. at 277 (plurality opinion); *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment). In other words, "[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate." *Croson*, 109 S. Ct. at 724 (opinion of the Court) (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 533-535 (1980) (Stevens, J., dissenting)).

The second part of the constitutional analysis focuses on whether a racial classification is "narrowly tailored" to promote the compelling governmental interest. In this regard, two factors were singled out by a majority of the Court in *Croson* and are particularly significant: (1) whether alternative race-neutral remedies were considered before resorting to race-conscious measures, see, *e.g.*, *Croson*, 109 S. Ct. at 728; *Wygant*, 476 U.S. at 283 (plurality opinion); *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring), and (2) whether the racial preference is limited to those who have in fact suffered the discrimination the program is designed to remedy. See, *e.g.*, *Croson*, 109 S. Ct. at 728-729; *id.* at 734 (Stevens, J., concurring); *United States* v. *Paradise*, 480 U.S.

[12] In addition, individual Members of the Court have suggested or found that the promotion of "racial diversity" may be a sufficiently compelling justification for the government to impose race-based measures, at least in the context of promoting a diverse student body or a diverse faculty in higher education. See *Bakke*, 438 U.S. at 311-315 (opinion of Powell, J.); *Wygant*, 476 U.S. at 306 (Marshall, J., dissenting); *id.* at 315-317 (Stevens, J., dissenting); see also *id.* at 286 (O'Connor, J., concurring in part and concurring in the judgment).

149, 171 (1987) (plurality opinion); *Wygant*, 476 U.S. at 276 (plurality opinion); *Fullilove*, 448 U.S. at 480-482, 486-488 (opinion of Burger, C.J.); *id.* at 510 (Powell, J., concurring). The Court has identified other factors relevant to the "narrow tailoring" inquiry as well, such as the flexibility and planned duration of the remedy, and the effect of the classification on innocent third parties. *Wygant*, 476 U.S. at 282-283 (plurality opinion); *id.* at 287 (O'Connor, J., concurring in part and concurring in the judgment); *Fullilove*, 448 U.S. at 514-515 (Powell, J., concurring).

B. For the reasons detailed in our brief submitted as amicus curiae in *Metro Broadcasting, Inc.* v. *FCC*, No. 89-453 (at 12-17), racial classifications adopted by the federal government must also withstand the "strict scrutiny" standard applied to those adopted by state and local governments. Like any racial classification, a federal preference program must be designed to achieve a compelling governmental interest. In deciding whether such an interest exists, a determination made by Congress that there is a need for remedial race-conscious action is entitled to significant deference. But this additional deference is appropriate only if Congress itself makes the critical determination that such a program is required, and only if this determination has an adequate basis in fact. And any such racial classification must be narrowly tailored to achieve the compelling interest identified by Congress.

II. The Federal Communication Commission's Minority Distress Sale Policy Is Not "Narrowly Tailored" To Achieve A "Compelling" Interest

The initial question presented by this case, therefore, is whether any "compelling" governmental interest may be found to justify the FCC's minority distress sale policy, a policy that permits certain licenses to be transferred only to minority-controlled firms. The second question is whether that policy is "narrowly tailored" to achieve the identified compelling governmental purpose. The Commission's policy fails on both scores.

A. 1. So far, this Court has endorsed only one sufficiently compelling justification for a racial classification, namely, remedying the effects of identified present or past racial discrimination. See pp. 11-12, *supra*. Although petitioner acknowledges (Br. 43) that "the principal goal of the distress sale policy is to promote diversity of expression, not to remedy prior discrimination," both petitioner (Br. 26-27 n.11) and the Commission (Br. 21-28) also argue that the distress sale policy may be sustained as an exercise of Congress's power to remedy prior discrimination.[13] For reasons set forth more fully in our brief in *Metro Broadcasting* (at 18-23), we do not believe that asserted interest may be invoked here.

First, Congress has not specifically mandated through appropriate statutory language that the Commission adopt or maintain the minority distress sale policy in order to remedy prior discrimination. See U.S. Amicus Br. 14-15, *Metro Broadcasting, Inc.* v. *FCC*, No. 89-453. The lottery statute, 47 U.S.C. 309(i)(3)(A), by its terms directs the FCC to adopt a minority preference only when awarding an initial license or construction permit "through the use of a system of random selection." *Id.* 309(i)(1). It does not purport to authorize the use of preferences under the distress sale policy. And the appropriations riders, which provide that the FCC is not to spend appropriated funds

[13] As we explained in our brief in *Metro Broadcasting* (at 22, 27-28), the FCC has consistently taken the position that its preference policies are *not* designed to remedy prior discrimination in the broadcasting industry. In this case, for example, the Commission stated in the court of appeals that its "minority ownership policies are based principally on the Commission's authority under the Communications Act to encourage diversity of programming on broadcast stations. The FCC's primary goal is not to remedy past discrimination." FCC C.A. Br. 29-30; J.A. 99-101; see Pet. App. 25a, 79a. As we understand the argument in its brief in this Court, the Commission does not retreat from its previously documented position regarding *its own* rationale for these policies, but simply asserts the remedial justification as one purportedly advanced by Congress. See Br. 21-31. The Commission does suggest in passing (Br. 30-31) that its otherwise "justifiable efforts" in regulating the broadcasting industry may have inadvertently hampered minority ownership of stations. That unsupported assertion is scarcely tantamount to a confession of prior discriminatory conduct, nor do any such inadvertent effects amount to unconstitutional discrimination of the sort that might justify race-conscious remedial action.

during a given fiscal year "to repeal, to retroactively apply changes in, or to continue a re-examination of [the Commission's minority distress sale policy]," 101 Stat. 1329-31 to 1329-32; 102 Stat. 2216-2217; 103 Stat. 1020-1021, by their terms only direct that the status quo be maintained with respect to *the Commission*'s policies – policies that have previously been understood to be grounded in the "programming diversity" rationale, rather than in any finding of prior discrimination. See note 13, *supra*; FCC Br. 32-34.[14]

Nor do the legislative histories of these provisions show that Congress harbored any specific intention to require – or endorse – Commission action to remedy prior discrimination by means of a distress sale policy. The history of the appropriations riders suggests that Congress understood the FCC's distress sale policy to be grounded in the programming diversity justification, not an anti-discrimination rationale. See U.S. Amicus Br. 20, 25-26, *Metro Broadcasting* v. *FCC*, No. 89-453.

[14] Although both the Commission (Br. 28-31) and petitioner (Br. 26-27 n.11) suggest that the lottery statute and the appropriations riders may be regarded as an exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment, neither party adequately explains how Section 5 can be applied to address alleged discrimination in an area regulated by the *federal* government. Section 5 gives Congress power to legislate only with respect to Section 1 of the Fourteenth Amendment, which in turn is concerned with *state* as opposed to federal action. See U.S. Amicus Br. 18 n.10, *Metro Broadcasting* v. *FCC*, No. 89-453. The only way to attribute ownership patterns in the broadcasting industry to state discrimination would be to adopt a theory of "societal discrimination" that is so amorphous it would effectively eliminate any distinction between remedial and nonremedial racial classifications. See pp. 17-19, *infra*.

This case therefore differs from *Fullilove*, where Congress could be said to be acting under Section 5 to rectify past discrimination in the awarding of public works contracts by the *States*. In any event, the Court need not reach the broader question whether Congress would have the power to adopt remedial race-conscious legislation for the broadcasting industry under Section 5 of the Fourteenth Amendment (or for that matter, under Section 2 of the Thirteenth Amendment, see *Jones* v. *Alfred H. Mayer & Co.*, 392 U.S. 409 (1968), which neither petitioner nor the FCC claims), since in our view it is clear that Congress has not attempted to do so with the requisite specificity or with the kind of supporting evidence required by *Fullilove*.

When Congress has enacted racial preferences that appear to be consistent with the standards set forth herein, the United States has defended such legislation against constitutional challenges. See, *e.g.*, *Carpenter* v. *Thornburg*, No. 88-3578 (4th Cir. Jan. 16, 1990).

And although the conference committee report on the legislation that adopted the lottery provision mentions a possible remedial justification in passing, H.R. Conf. Rep. No. 765, 97th Cong., 2d. Sess. 43 (1982), this reference—which was directed to a different preference program—cannot, as the Commission suggests (Br. 22-23, 24, 27, 28), substitute for an express congressional directive to maintain the distress sale policy in order to overcome past discrimination.

Second, even if Congress could somehow be viewed as having adopted a remedial justification, Congress did not have sufficient evidence before it of prior discrimination in the broadcasting industry to justify race-conscious relief. See, *e.g.*, *Croson*, 109 S. Ct. at 727 (opinion of the Court); *Wygant*, 476 U.S. at 277 (plurality opinion); *Fullilove*, 448 U.S. at 533-535 (Stevens, J., dissenting). To the contrary, as Judge Silberman correctly observed, Pet. App. 28a-29a, there can be no claim based on the sparse legislative history of the appropriations riders that Congress had before it evidence suggesting that minorities have been denied effective participation in the broadcasting industry either because of official or private acts of discrimination. This is rather a case like *Croson*, in which "[t]here is nothing approaching a prima facie case of constitutional or statutory violation by *anyone*" in the broadcasting industry. 109 S. Ct. at 724 (opinion of the Court).

Nor does the bare mention of a possible remedial justification in the legislative history of the lottery program constitute the kind of factual predicate necessary to sustain the use of a racial classification. Compare *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.) (relying on extensive legislative history of related legislation). To begin with, the relevant statement—the "Conferees find that the effects of past inequities stemming from racial and ethnic discrimination have resulted in severe underrepresentation of minorities in the media of mass communications * * *," H.R. Conf. Rep. No. 765, *supra*, at 43—carefully avoids asserting that there in fact has been any discrimination *in the broadcasting industry*. Rather, it speaks of "underrepresentation" of minorities in "media of mass communications" (not explicitly broadcasting), resulting from

"the effects of past inequities," which in turn have "stemmed" from racial and ethnic discrimination. The statement therefore at most asserts that generalized societal discrimination has had an effect on the communications industry, not unlike the effect such discrimination would have across the board; it does not make any finding of past discrimination in broadcasting or by the FCC. This is confirmed by an earlier conference report, which described the rationale for the lottery preference in this way:

> It is the firm intention of the conferees that ownership by minorities, such as blacks and hispanics, * * * and ownership by other underrepresented groups, such as labor unions and community organizations, is to be encouraged through the award of significant preferences in any such random selection proceeding. These are the groups which are inadequately represented in terms of nationwide telecommunications ownership, and it is the intention of the conferees * * * that the objective of increasing the number of media outlets owned by such persons or groups be met.

H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981). This statement makes no mention of discrimination at all. Thus, it is far from clear whether the conferees, in calling for a racial preference in a lottery system, were focusing on the need to remedy identified discrimination in the broadcast industry, or were simply intent on increasing minority ownership of broadcast licenses for its own sake—a clearly impermissible governmental objective. See p. 19, *infra*.

Given this legislative record, it is not surprising that the Commission (Br. 30-31) and amici (*e.g.*, Congressional Black Caucus, et al., Br. 18-24), frankly seek to justify the preference policies as an effort to remedy prior "societal discrimination." This Court has tended to viewed such arguments with great caution, see *Croson*, 109 S.Ct. at 723 (plurality opinion); *Wygant*, 476 U.S. at 276 (plurality opinion); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.), and with good reason. The type of "societal discrimination" invoked by the Commission and others

operates at such a diffuse level that it would justify the use of racial preferences in virtually every aspect of organized social life. The inherently suspect nature of racial classifications requires a more focused and meaningful inquiry. In this case, for example, no one maintains that the Commission has discriminated against minorities in awarding broadcast licenses. And although the contention is made that the original allocation of broadcast licenses occurred at a time when "most licenses [were] awarded to white males," ACLU Amicus Br. 19, this hardly amounts to proof or even an assertion of prior discrimination, and does not mean that the original allocation has remained frozen since then or that later changes in the allocation were infected by discrimination. Any such claim ignores the realities of the modern broadcasting industry, where it appears that roughly 1000 radio stations and 250 television stations (approximately 9% of all broadcast stations) are sold each year.[15] Thus, as long as there is no discrimination today in the broadcast industry, minority groups should have the same opportunity to obtain broadcast licenses as nonminorities do. To the extent they do not or cannot avail themselves of that equal opportunity, it is not because of discrimination in the broadcast industry or by the FCC.

It follows that the "societal discrimination" advanced in this case boils down to the proposition that, because of past discrimination, Blacks and other minority groups have, on average, accumulated fewer of the skills and resources needed to acquire the financing and prior experience necessary to secure a broadcasting license than, again on average, nonminorities have. But this type of societal discrimination is so "amorphous," *Wygant*, 476 U.S. at 276 (plurality opinion), that it would justify the use of racial preferences in virtually any business where there is "underrepresentation" of minorities. Moreover, it would seemingly require that those preferential policies remain

[15] These figures are based on the FCC's estimate that approximately one-half of all transfer applications approved each year reflect station sales (as opposed to reorganizations), and on averages over the past 10 years. See Broadcast/Mass Media Application Statistics, FCC Ann. Rep. (Fiscal Years 1979-1988).

in effect until all racial and ethnic groups have reached exact "parity" in every industry or segment of society. If racial preferences can be justified by "discrimination" identified at this level of abstraction, then any meaningful distinction between legitimate remedial action and preferences for preferences sake would disappear.

The FCC has avoided suggesting that it may seek to promote diverse ownership as an end in itself. As Justice Powell stated, "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids." *Bakke*, 438 U.S. at 307; accord *Croson*, 109 S. Ct. at 721 (plurality opinion); *id.* at 730-734 (Stevens, J., concurring in part and concurring in the judgment); *id* at 735, 739 (Scalia, J., concurring in the judgment). Nevertheless, given the inadequate supporting record and the confused state of affairs surrounding its preference policies, the Commission may well be pursuing just that sort of impermissible endeavor.

2. Even if it could be said that the FCC's minority distress sale policy was adopted to remedy prior identified discrimination, it is plainly not "narrowly tailored" to achieve that alleged purpose.[16] First, neither Congress nor the Commission has adequately considered less intrusive race-neutral means to increase minority ownership of broadcasting licenses. See, *e.g.*, *Croson*, 109 S. Ct. at 728; *Fullilove*, 448 U.S. at 463-467 (opinion of Burger, C.J.); *id.* at 511 (Powell, J., concurring). The FCC (Br. 38-39) suggests that recent efforts to increase the total number of radio and television stations and to relax certain financial requirements for prospective license holders show that it has considered race-neutral measures to remedy the effects of prior discrimination. But it is implausible to regard these as steps taken to rectify prior discrimination, since the Commission itself has never regarded the lack of minority ownership of

[16] Petitioner contends (Br. 27-29) that the Court should defer to the choice of race-conscious measures adopted by the Congress and the Commission. For the reasons explained in our brief in *Metro Broadcasting* (at 15-17), the Court has already eschewed such an approach.

broadcasting licenses to be the result of discrimination in the broadcasting industry. See p. 14 & note 13, *supra*. In any event, with one exception,[17] these measures were not designed to increase diversity of *ownership* of broadcast licenses, as opposed to increasing diversity of *programming*, and thus they have no nexus to the stated rationale.

Second, the minority distress sale policy is not aimed at correcting the actual effects of past discrimination. See, *e.g.*, *Croson*, 109 S. Ct. at 728-729; *id.* at 734 (Stevens, J., concurring in part and concurring in the judgment); *Paradise*, 480 U.S. at 171 (plurality opinion); *Fullilove*, 448 U.S. at 480-482, 486-488 (opinion of Burger, C.J.); *id.* at 510 (Powell, J., concurring). In particular, the policy, as applied, does not permit an inquiry to determine whether any particular minority applicant was in fact not disadvantaged by past discrimination. As Judge Silberman observed, the distress sale policy "in no way require[s] the preference to be tied to the disadvantage suffered by the minority enterprise. There is no opportunity here to ensure that participating minority enterprises have actually been disadvantaged by past discrimination or its effects." Pet. App. 30a; see *id.* at 61a-63a (MacKinnon, J., concurring in the judgment).

The Commission (Br. 42-46) and petitioner (Br. 30-39) take pains to point out that the distress sale policy, which in practice applies in a relatively narrow set of circumstances (see pp. 2-3, *supra*), has accounted for only 38 sales over the past decade—a period during which the Commission approved approximately 10,000 sales of broadcast stations (see note 5, *supra*). But the fact that explicit consideration of race or ethnic background is limited to a few cases does not mean that such consideration is "narrowly tailored" in a constitutionally relevant sense. For example, it does not mean that the policy will be applied only to those who are truly disadvantaged or only when it will not injure innocent third parties. As this case makes plain, minority

[17] The Commission's "procedures to disseminate more widely information about the availability of potential minority buyers of broadcast stations" (FCC Br. 39) would appear to be an effort to increase minority ownership of licenses, as opposed to minority-oriented programming.

ownership is the determinative factor in the Commission's approval of the distress sale, whether or not the applicant can show that the particular minority owner has been disadvantaged.[18] As Judge Silberman noted, the FCC's policy can clearly injure third parties: "It is a Hartford station Shurberg wants and, after all is said and done, he has been absolutely denied an opportunity to compete for one merely because of his race." Pet. App. 35a; see *id.* at 66a-68a (MacKinnon, J., concurring in the judgment).[19] Finally, the fact that the Commission may have discriminated on the basis of race or ethnic origin only 38 times in the past decade through this program is in any event a curious defense of that program's legitimacy.

B. 1. The second asserted justification for restricting access to the distress sale program on the basis of skin color and ethnic background—and the one on which the Commission (Br. 23-24, 32-34, 35-38) and petitioner (Br. 19-26) principally rely—is to further diversity of programming. As we pointed out in our brief in *Metro Broadcasting* (at 24), this asserted justification is clearly different from any of the rationales previously considered by this Court in support of minority preference programs. As we also noted, there is reason to question whether this justification, as applied to the public broadcast spectrum, qualifies as "compelling."

a. There can be no doubt that promoting diversity of opinion and viewpoints is a legitimate governmental interest, sufficient to sustain content-neutral and race-neutral measures that do not infringe on fundamental constitutional rights. See *Associated Press* v. *United States*, 326 U.S. 1 (1945) (upholding application of the antitrust laws to the news media); *FCC* v. *Na-*

[18] Indeed, in light of certain factual allegations raised by Shurberg, see, *e.g.*, Br. in Opp. 6-9; J.A. 68-69, there appear to be doubts regarding the propriety of characterizing petitioner as "minority-controlled" by virtue of having Mr. Ramirez as a general partner.

[19] For this reason, the Commission's observation (Br. 44) that a nonminority applicant can overcome the distress sale preference by filing a timely application for a mutually exclusive license merely shows that the distress sale program is likely to affect only a small number of cases. It does not establish that the program, where it does apply, is narrowly tailored.

tional Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) (upholding FCC rules limiting cross-ownership of broadcast licenses and newspapers in the same community); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding FCC rules limiting the total number of stations in any service area that a person may own or control). With respect to the newsprint media, however, this Court has held that the promotion of diverse viewpoints is *not* sufficiently compelling to justify coercive governmental measures that interfere with the First Amendment rights of newspaper publishers. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 248 (1974). The Court had previously reached a contrary conclusion with respect to the broadcast media in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), but did so largely because of factual circumstances—a perceived scarcity of broadcast outlets—that the Commission has recently determined no longer exists. See pp. 25-26, *infra*. It is thus far from clear that the interest in promoting "programming diversity" is sufficiently compelling to justify the use of racial classifications that would otherwise infringe upon equal protection rights.

The idea that the government has a compelling interest in promoting viewpoints identified with specific racial or ethnic groups is also deeply troubling. The proposition that certain minority groups have distinctive tastes and preferences in programming, and that minority owners will be more disposed than nonminority owners to offer such programming, have not been demonstrated by credible empirical evidence. See pp. 23-25, *infra*. But even if they were, it is quite another thing for the government to adopt an official *presumption* that the color of a person's skin or his ethnic background will predict the way he will think and act. These types of presumptions—usually referred to as stereotypes—"carry a danger of stigmatic harm" and "may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 109 S. Ct. at 721.[20]

---

[20] Petitioner's submissions to the Commission regarding its proposed "minority programming" appear to confirm that these types of race-conscious preferences may lead to stereotyping. See, *e.g.*, J.A. 24-27, 31-33.

b. Even if programming diversity might in theory qualify as a compelling governmental interest, there are other reasons why it cannot sustain the Commission's distress sale policy. As in the case of the FCC's comparative license preference policy (U.S. Amicus Br. 25-26, *Metro Broadcasting, Inc.* v. *FCC*, No. 89-453), Congress has never adopted legislation that expressly directs the FCC to adopt a distress sale policy in order to promote programming diversity. The most that can be said is that there are expressions in the legislative history of the appropriations riders indicating that individual members of Congress approved of that policy. See, *e.g.*, S. Rep. No. 182, 100th Cong., 1st Sess. 76 (1987); 134 Cong. Rec. S10,021 (daily ed. July 27, 1988) (statement of Sen. Hollings); 133 Cong. Rec. S14,395 (daily ed. Oct. 15, 1987) (statement of Sen. Lautenberg). But when Congress seeks to require the use of racial classifications that would otherwise violate equal protection, it must make its intention "unmistakably clear in the language of the statute." *Dellmuth* v. *Muth*, 109 S. Ct. 2397, 2400 (1989) (citation omitted). A bland directive in a massive appropriations rider that by its terms merely directs that no money be spent during the fiscal year to change the status quo does not satisfy this requirement. See *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 114-116 (1976); see also *TVA* v. *Hill*, 437 U.S. 153, 190-191 (1978).

c. In any event, even if it could be said that Congress had expressly directed the Commission to award minority preferences in order to enhance programming diversity, it cannot be said that Congress had an adequate basis in fact to justify such action. In order to demonstrate the need for racial preferences on this rationale, it would be necessary to show: (1) that different racial or ethnic groups have distinctive listening or viewing tastes; (2) that one or more of these distinctive racial or ethnic tastes are being undersupplied by today's broadcasting industry; and (3) that increasing the percentage of minority owners would overcome the shortage of programming that serves these distinctive tastes. See *Winter Park Communications* v. *FCC*, 873 F.2d 347, 358 (D.C. Cir. 1989), cert. granted, 110 S. Ct. 715 (1990) (Williams, J., dissenting). To the extent

that Congress even perceived the need to resolve these questions, however, it merely assumed the answers. See Pet. App. 46a.

The FCC (Br. 9-10, 36-37) and petitioner (Br. 45-47) point out that there is scattered anecdotal testimony offered by various individuals and interest groups in congressional hearings that might support one or more of these propositions.[21] But where, as here, Congress has not affirmatively enacted legislation based on any finding that race is a reliable proxy for programming choices, such an unfocused gathering of information is an inadequate basis for invoking an otherwise suspect racial classification.

The Commission also suggests (Br. 26, 36 n.32) that Congress could have properly relied on a recent report filed by the Congressional Research Service that purports to document a correlation between minority ownership and diverse programming. Congressional Research Service, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (June 29, 1988). But that report is so fundamentally flawed as to deprive it of any significance. For example, it fails even to define "minority programming," and it fails to take into account the possible differences in the racial composition of various station owners' audiences. See *Winter Park Communications*, 873 F.2d at 358-361 (Williams, J., dissenting). In any event, apart from one passing reference to that report in the pertinent legislative record, see 134 Cong. Rec. S10,021 (daily ed. July 27,

[21] See *Minority Ownership of Broadcast Stations: Hearing Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 1st Sess. (1989) [*1989 Hearing*]; *Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. (1986); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983); *Parity for Minorities in the Media: Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. (1983).

1988) (statement of Sen. Hollings), there are no indications that Congress even considered, let alone accepted, the tentative findings in the CRS survey in connection with maintaining the appropriations provision blocking the FCC's inquiry proceeding.[22]

Finally, the Commission (Br. 2, 26-28, 36-37) and petitioner (Br. 45-47) contend that Congress could have relied on conclusions reached in the *Report of the National Advisory Commission on Civil Disorders* (1968), and the United States Civil Rights Commission's monographs, *Window Dressing on the Set: Women and Minorities in Television* (Aug. 1977), and *Window Dressing on the Set: An Update* (Jan. 1979). But those reports, by their terms, do not even purport to show that race is a reliable proxy for programming choices.

Each of the foregoing sources of supposed factual support for the programming diversity rationale also suffers from a more fundamental shortcoming. Neither petitioner, nor the Commission, nor any of the supporting amici, explain why the conclusions reached in the various studies—some of which are more than two decades old—have any continuing relevance when the Commission itself has determined in another context that fundamental changes in the broadcasting industry have eliminated the need for intrusive government regulation in order to ensure "programming diversity." Specifically, because of increased numbers of broadcast outlets, and the introduction of cable television and other new technologies, the Commission has decided to abandon the "fairness doctrine," noting that there are now a "sufficient number of over-the-air television and radio voices to insure the presentation of diverse opinions on issues of public importance." *Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 143, 208 (1985); see *Syracuse Peace Council* v. *FCC*, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 110 S. Ct. 717 (1990). As the Commission has previously recognized, these fundamental

[22] Indeed, Senator Inouye, a leading proponent of the Commission's minority preference policies, recently acknowledged that Congress "need[s] to demonstrate that minority * * * ownership of broadcast stations does, in fact, promote diversity in the views presented on the airwaves." *1989 Hearing* at 2.

changes in the broadcasting industry also call into question the need for special policies regarding minority ownership designed to enhance programming diversity.[23]

If the record before Congress fails to disclose any factual support for the programming diversity theory, neither does the administrative history of the FCC policy offer anything to fill "this evidentiary void." *Winter Park Communications,* 873 F.2d at 358 (Williams, J., dissenting). The Commission initially adopted its policy not after any careful study of the need for additional programming diversity and the relationship between ownership and programming, but rather at the direction of the court of appeals for the District of Columbia Circuit. See pp. 2-3, *supra.* The court of appeals, in turn, merely assumed that there was inadequate "minority" programming, and that increased minority ownership would rectify this shortcoming. See *Garrett,* 513 F.2d at 1063.

The administrative record compiled by the Commission, such as it is, confirms that the Commission also acted on the basis of untested assumptions.[24] In fact, the Commission has candidly admitted the lack of an evidentiary predicate for the preference policy. In 1986, the FCC conceded that no Commission proceeding establishes as a fact that

---

[23] The Commission has recognized that those changes in the marketplace have resulted in [a] * * * rich array of information and entertainment programming, and, further, that this phenomenon of increased competition driving increased program diversity will continue. These findings demonstrate that in the current environment there is little if any basis to assume that racial or gender preferences are essential to the availability of minorities' or women's viewpoints. Thus, rather than there being a record to demonstrate that these preferences are essential, what record is available suggests otherwise.

Brief for FCC on Rehearing En Banc at 26-27, *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985).

[24] For example, the 1978 Policy Statement, 68 F.C.C.2d at 981, quotes the *Task Force Report*. The *Task Force Report*, in turn, expressly relies on decisions such as *TV 9* and *Garrett* for its endorsement of the proposition that increased minority ownership will promote "greater diversity in the media." *Task Force Report* at 4; see *id.* at 4-6.

> the race * * * of an owner necessarily has a direct nexus to program content. * * * The substantial deference normally accorded the Commission's judgmental and predictive determinations cannot justify reliance on suspect classifications to enhance program diversity in the absence of a clear and specific foundation upon which to base its conclusion. Here the agency needs a factual basis to support the assumed nexus, but none has ever been established.

Brief for FCC on Rehearing En Banc at 27-28, *Steele* v. *FCC*, 770 F.2d 1192 (D.C. Cir. 1985). It was precisely for that reason that the Commission initiated its inquiry proceeding in December 1986. See note 1, *supra.* Congress, however, terminated that investigation, see note 7, *supra,* and thus the Commission has been unable to determine whether the asserted purpose of the minority preference policy has any factual support either now or over a decade ago when it was first adopted. Congress cannot simultaneously purport to rely on the "findings" of an administrative agency and yet prohibit that agency from engaging in a more complete inquiry to determine the actual facts.

2. Putting aside the evidentiary difficulties with the "programming diversity" rationale, that policy is not "narrowly tailored" to accomplish the asserted goal. The policy's goal—diverse programming—is too indeterminate to allow either the Commission or any reviewing court to know whether it has ever been attained. This Court has made clear that such a feature, which renders the preference policy potentially "ageless in [its] reach into the past, and timeless in [its] ability to affect the future," *Wygant*, 476 U.S. at 276 (plurality opinion), precludes the use of a racial classification. See, *e.g.*, *Croson*, 109 S. Ct. at 723 (plurality opinion); *Paradise,* 480 U.S. at 171 (plurality opinion). As Judge MacKinnon observed, "because the distress sale program has no limits of any character it is not sufficiently tailored to the goal of promoting programming diversity. Compliance is voluntary and the program contains no assurance that any programming diversity will be achieved. Thus, the FCC, subject only to the broad public interest standard, has unfettered discretion in approving distress sales." Pet. App. 63a-64a (footnote omitted).

C. Implicitly acknowledging that neither the remedial justification nor the programming diversity justification will bear scrutiny, the Commission and certain amici also advance certain other, novel justifications for the FCC's minority programs. None of these new justifications has been expressly invoked by Congress, nor has any been previously relied upon by the FCC. Thus, for the reasons noted above and in our brief in *Metro Broadcasting* (at 14-15, 19, 22, 25-26), they would not be entitled to any additional deference in determining whether the use of a racial classification is permissible. In any event, they suffer from many of the same analytical deficiencies as the remedial and programming diversity theories.

The Commission (Br. at 30) suggests that "[b]roadcasting, unlike other industries, such as the construction industry in *Fullilove* and *Croson*, involves the use of a unique, limited resource pursuant to a system of government licensing." But all resources subject to government licensing are "unique." This attribute, by itself, cannot distinguish FCC broadcasting licenses from offshore oil drilling permits, or patents, or airport landing rights. If the Commission means to suggest that broadcasting licenses are of "unique" public importance, the only apparent reason why this would be so would be because broadcasting supplies information and opinion to the public; if this is the underlying reason, however, then the unique resource notion collapses into a version of the programming diversity argument. In any event, there is no reason why this "unique resource" should be, as the Commission suggests (Br. at 31), subject to "[e]ntrenched ownership patterns." As long as broadcast licenses are freely bought and sold in the secondary market – as the Commission's own data show they are – then it is hard to see why a minority preference program is necessary to modify the distribution of broadcasting licenses that existed when the industry was in its infancy.

Certain amici (ACLU Br. at 9) suggest what they call a "structural" justification for the FCC preference programs, based on an alleged "need to repair the damaged institution through the use of race or sex as an allocative" criterion. But amici do not explain why broadcasting is a "damaged institution," unless it

has either been distorted by prior discrimination, or is structured in such a way that it fails to supply diverse programming. From all that appears, therefore, the "structural" justification is another name for either the remedial or the programming diversity theory. And to the extent that this justification also carries the suggestion that there is some permanent imbalance built into the broadcasting industry stemming from the original allocation of licenses it, like the Commission's notion of a "unique resources," completely disregards the rapid turnover in broadcasting authority that should permit any such imbalance to be rectified.

The quest for an alternative rationale only reinforces the conclusion that the FCC's minority preference programs are policies in search of a supporting justification. This Court has consistently rejected the idea that the government may pursue a policy of racial balancing for its own sake. See p. 19, *supra*. Yet the creative energies expended in a post hoc effort to uncover a sustainable rationale for the FCC's preference programs suggests that this may in fact be all that they represent.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

JOHN G. ROBERTS, JR.
*Acting Solicitor General**
JAMES P. TURNER
Acting Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
ROGER CLEGG
Deputy Assistant Attorney General
MICHAEL R. LAZERWITZ
Assistant to the Solicitor General

MARCH 1990

---

* The Solicitor General is disqualified in this case.

U.S. GOVERNMENT PRINTING OFFICE: 1990 – 262-203/00794